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CONTRIBUTION IN PRIVATE ANTITRUST SUITS

Federal courts, ostensibly following the common-law rule against contribution among joint tortfeasors,¹ have consistently held that private antitrust defendants² may not maintain contribution actions against companion wrongdoers.³ Applied in conjunction with the treble-damage remedy⁴ and joint and several liability,⁵ this rule may impose catastrophic losses on individual participants in anticompetitive activities. The availability of contribution thus assumes unusual importance in private antitrust litigation. This Note examines the law of contribution in private antitrust suits, identifies serious conceptual and practical weaknesses in the current practice of denying contribution, and proposes a fresh approach that looks primarily to the nature of the antitrust violation.

¹ The common-law rule bars jointly and severally liable tortfeasors from obtaining reimbursement ("contribution") from their fellow wrongdoers of amounts paid in excess of their pro rata share of the common liability. By the better view, the common-law rule was created to deal only with intentional tortfeasors. See, e.g., W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 50, at 306 (4th ed. 1971); Reath, *Contribution Between Persons Jointly Charged For Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176, 177-78 (1898). This view, however, has been slow to take hold among American jurisdictions, many of which apply the rule equally to intentional and unintentional tortfeasors. See W. PROSSER, *supra* § 50, at 306. The basis of the rule, to the extent that a rational basis exists, lies in the maxim that "no man can make his own misconduct the ground for an action in his own favor. . . . The law cannot recognize equities as springing from a wrong in favor of one concerned in committing it." 1 T. COOLEY, *LAW OF TORTS* § 89, at 291-92 (4th ed. 1932). See generally Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L. Q. 552 (1936).

² Throughout this Note the phrase "private antitrust defendants" will refer to defendants in civil treble-damage suits brought under § 4 of the Clayton Act (15 U.S.C. § 15 (1970)).

³ *El Camino Glass v. Sunglo Glass Co.*, [1977-1] TRADE CAS. (CCH) ¶ 61,533 (N.D. Cal. 1976); *Sabre Shipping Corp. v. American Pres. Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969). See *Goldlawr, Inc. v. Shubert*, 276 F.2d 614 (3d Cir. 1960) (dictum); *Baughman v. Cooper-Jarrett, Inc.*, 391 F. Supp. 671 (W.D. Pa. 1975) (dictum); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163 (D. Del. 1974) (dictum). But see *Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140, 145 n.6 (E.D. Pa. 1976) (dictum).

⁴ Section 4 of the Clayton Act (15 U.S.C. § 15 (1970)) provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained . . ."

⁵ Antitrust co-conspirators are jointly and severally liable for the damages they inflict. See *Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 392 n.4 (5th Cir. 1976); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 11-12 (N.D. Ga. 1973); *Washington v. American Pipe & Constr. Co.*, 280 F. Supp. 802, 804 (S.D. Cal. 1968).

I

BACKGROUND

A. *Sabre Shipping*

In more than eight decades of private antitrust litigation,⁶ courts have confronted the issue of contribution only twice. *Sabre Shipping Corp. v. American President Lines, Ltd.*,⁷ the ground-breaking case, arose out of an alleged conspiracy among shipping firms to destroy the plaintiff's business.⁸ The immediate issue before the court was the substantive right of a private antitrust defendant to implead certain alleged co-conspirators with whom the plaintiff had settled and had covenanted not to sue.⁹ In effect, the cove-

⁶ Private antitrust actions were first authorized by the Sherman Act, ch. 647, § 7, 26 Stat. 211 (1890) (current version at 15 U.S.C. §§ 1, 2 (1970)).

⁷ 298 F. Supp. 1339 (S.D.N.Y. 1969).

⁸ The plaintiff contended that competing shipping firms had retaliated against the plaintiff's refusal to join their trade group by cutting their rates and driving the plaintiff into bankruptcy, in violation of §§ 1 and 2 of the Sherman Act. The plaintiff sought \$49 million in damages and attorneys' fees. *Sabre Shipping Corp. v. American Pres. Lines, Ltd.*, 285 F. Supp. 949, 950-51 (S.D.N.Y. 1968), *cert. denied*, 407 F.2d 173 (2d Cir.), *cert. denied*, 395 U.S. 922 (1969).

⁹ The settling defendants' agreement with the original plaintiff was a "covenant not to sue," and not a "release." Although the two devices appear to achieve the same goal, they can have different legal effects. A covenant not to sue is a contractual obligation. When *Sabre Shipping Corp.* (Sabre) covenanted not to sue the settling defendants, it agreed, for consideration, to refrain from asserting a particular cause of action. The outstanding liability, however, remained in existence. If Sabre had sued in violation of the covenant, the action would not have been dismissed, but Sabre would have been subject to a counterclaim for breach of contract. *See, e.g., Aiken v. Insull*, 122 F.2d 746, 751 (7th Cir. 1941), *cert. denied*, 315 U.S. 806 (1942). A release would have operated differently. Had Sabre released the settling defendants, their liabilities would have been extinguished and the release would constitute an affirmative defense to an action by Sabre. *See* FED. R. CIV. P. 8(c).

This difference in the operation of covenants not to sue and releases acquired great importance at common law. Because common-law courts viewed joint tortfeasors as causing indivisible injury, they developed the so-called "unity of release" rule under which the release of one joint tortfeasor released all of the others:

It is, we think, clear law, that a release granted to one joint tortfeasor, or to one joint debtor, operates as a discharge of the other joint tortfeasor, or the other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released.

Duck v. Mayeu, [1892] 2 Q.B. 511, 513. *See McCloskey v. Porter*, 161 Mont. 307, 316-17, 506 P.2d 845, 850 (1973) (concurring opinion); *Adolph Gottscho, Inc. v. American Marketing Corp.*, 18 N.J. 467, 470-71, 114 A.2d 438, 439-40, *cert. denied*, 350 U.S. 834 (1955). Because it left the underlying cause intact, the covenant not to sue did not share this undesirable side effect.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 346-47 (1971), the Supreme Court abolished the "unity of release" rule in an antitrust context, thereby eroding the distinction between releases and covenants not to sue. The irrevocable nature of releases, however, remains as a basis for the distinction.

nants subjected the remaining defendants to the entirety of the plaintiff's claim,¹⁰ no matter how small their role in the conspiracy. A number of the nonsettling defendants therefore sought to compel the settling defendants to contribute their proportional shares of any eventual liability.¹¹

The district court dismissed the third-party complaint.¹² The court reasoned that federal common law supplies the governing rules of decision in causes of action created by federal statutes, that there is no right of contribution among joint tortfeasors at federal common law, and that therefore a private antitrust defendant could not maintain an action for contribution.¹³ This syllogistic analysis drew support, in the court's view, from two additional considerations. First, in contrast to the securities laws,¹⁴ the antitrust laws do not provide for contribution. This omission "demonstrate[d] . . . that Congress, aware of the rule against contribution, saw fit to provide for it explicitly in the securities statutes but not in the enforcement of antitrust laws which dominate so much of our litigation, and that no such right should be implied."¹⁵ Second, the court feared that contribution among defendants might impede prompt recoveries by original plaintiffs:

If one or two defendants sued by a plaintiff . . . could turn around and implead all other persons directly and indirectly involved in the alleged conspiracy, . . . control of [the plaintiff's] action would be taken out of his hands. It would operate to prevent his receiving prompt recovery since no defendant would settle with him if he was to find himself back in the suit as a third party defendant.¹⁶

The scope of the holding in *Sabre Shipping* has prompted considerable controversy. Two federal decisions have cited the case for the broad proposition that contribution is generally unavailable to

¹⁰ Antitrust co-conspirators are jointly and severally liable. See note 5 *supra*. Nevertheless, the nonsettling defendants would be entitled to a set-off in an amount equal to the total consideration paid in settlement. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971).

¹¹ The nonsettling defendants argued that "if the acts alleged were done, they were the joint acts of third party plaintiffs and third party defendants [and] that any liability of the [third-party plaintiffs] will arise out of their joint acts . . ." 298 F. Supp. at 1341.

¹² *Id.* at 1346.

¹³ *Id.* at 1343-46. The court cited no authority for the critical proposition that the third-party plaintiff was in fact a tortfeasor.

¹⁴ Securities Act of 1933, § 11(f), 15 U.S.C. § 77k (1970), and Securities Exchange Act of 1934, §§ 9(e), 18(b), 15 U.S.C. §§ 78i, 78r (1970), expressly provide for contribution.

¹⁵ 298 F. Supp. at 1345.

¹⁶ *Id.* at 1346.

private antitrust defendants.¹⁷ The holding, however, can be read as applying only to intentional violators of the antitrust laws.¹⁸ Thus, the court in *Sabre Shipping* recognized that the District of Columbia Circuit permitted contribution among unintentional tortfeasors, but stated: "Since even there the rule is limited to unintentional torts, it emphasizes the difference between those and intentional torts, as we have here, and [would] be of no avail to third party plaintiffs even if applicable."¹⁹

By its reference to "intentional torts," the court might have meant either that all "antitrust torts" are intentional torts, or simply that the particular third-party plaintiffs then before it were intentional tortfeasors.²⁰ Because of this ambiguity, a court narrowly construing *Sabre Shipping* might deny contribution only to intentional violators of the antitrust laws. Whether the decision extended to unintentional violators as well became the central issue in the only other case to consider the contribution issue on its merits, *El Camino Glass v. Sunglo Glass Co.*²¹

B. *El Camino Glass*

In *El Camino Glass*, automotive glass dealers charged their suppliers with price-fixing and other antitrust violations. One of the named defendants sought to implead an alleged co-conspirator who had not been joined in the original action. The third-party plaintiff hoped to avoid the holding of *Sabre Shipping* by asserting that any violation of the antitrust laws it had committed had been "at most unintentional and in good faith."²² The district court granted the third-party defendant's motion to dismiss,²³ and the Ninth Circuit refused to hear an interlocutory appeal on the contribution issue.²⁴

¹⁷ *El Camino Glass v. Sunglo Glass Co.*, [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,111 (N.D. Cal. 1976); *DiBenedetto v. United States*, 35 A.F.T.R.2d ¶ 75-692, at 75-1504 (D.R.I. 1974).

¹⁸ *See* *Baughman v. Cooper-Jarrett, Inc.*, 391 F. Supp. 671, 678 n.3 (S.D.N.Y. 1975).

¹⁹ 298 F. Supp. at 1345.

²⁰ A subsequent statement in the opinion is equally ambiguous:

If the Supreme Court [in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952)] was reluctant to depart from the rule as between unintentional tortfeasors, whose sole culpability was one of lack of care, how presumptuous it would be for this Court to do so for the benefit of intentional wrongdoers, whose acts are so severely castigated by Congress, to the point of providing criminal sanctions including imprisonment.

298 F. Supp. at 1346.

²¹ [1977-1] TRADE CAS. (CCH) ¶ 61,533 (N.D. Cal. 1976).

²² *Id.* at 72,111.

²³ *Id.* at 72,112.

²⁴ *United Glass Co. v. Michaels*, No. 76-8162 (9th Cir., filed June 22, 1976).

The district court adopted *Sabre Shipping's* reasoning that the federal common-law rule against contribution among joint tortfeasors applied to bar the third-party complaint.²⁵ Although the court stated that this analysis did not depend on whether the defendant's conduct had been intentional,²⁶ it felt constrained to consider whether lack of intent should affect a private antitrust defendant's entitlement to contribution. The court took cognizance of "the considerations of equity and fairness which underlie the modern trend towards permitting contribution in cases of unintentional torts,"²⁷ and weighed them against what it perceived as countervailing considerations: a congressional intent that antitrust liability be determined without regard to the defendant's state of mind; the detrimental effect that contribution might have on plaintiffs' attempts to control the size and scope of their lawsuits; and the possibility that denying contribution would further deter antitrust violations.²⁸ The court concluded that "the ends of justice [would] be better served by holding that contribution is not available in an antitrust suit."²⁹ Notably, however, the court certified an immediate interlocutory appeal because its order involved a question of law "as to which there is substantial ground for difference of opinion."³⁰

II

A CRITIQUE OF *Sabre Shipping* AND *El Camino Glass*

Although both *Sabre Shipping* and *El Camino Glass* advanced secondary policy considerations for denying contribution, both decisions rested on the following syllogism: (1) the federal common law does not permit contribution among joint tortfeasors; (2) anti-

²⁵ [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,111. As in *Sabre Shipping*, the court adduced no authority for the proposition that the third-party plaintiff was in fact a tortfeasor.

²⁶ *Id.* at 72,111 n.2. The contribution rule enunciated in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), upon which *El Camino Glass* relied, applied to unintentional tortfeasors. See note 20 *supra*.

²⁷ [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,112.

²⁸ *Id.* The court adverted to a number of other considerations as well, but did not rely on them. These included the points raised in *Sabre Shipping* regarding congressional intent and hardship on private antitrust plaintiffs (see text accompanying notes 14-16 *supra*), the complexity of antitrust litigation, and the apparent inappropriateness of injecting the issue of a defendant's state of mind into an antitrust case. [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,112.

²⁹ [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,112.

³⁰ *Id.* at 72,112-13.

trust violators are tortfeasors; (3) therefore, contribution is not available among private antitrust defendants. Each of these steps rests on faulty analysis.

A. *The Federal Common Law of Contribution*

Both *Sabre Shipping* and *El Camino Glass* properly looked to federal common law for the appropriate rules of decision.³¹ Since the courts in both cases implicitly assumed that the plaintiffs' antitrust claims sounded in tort, they began their analyses by examining the federal common-law rule regarding contribution among joint tortfeasors. Both opinions relied heavily on the Supreme Court's decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*³² for the proposition that no right of contribution exists among joint

³¹ At issue in both cases were substantive rights created entirely by federal law; thus, the rule of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), was inapplicable, and the courts were free to apply federal rules of decision. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943); *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942). However,

even in situations where the federal courts are not bound by the constitutional principles underlying *Erie* to apply state law, they might refrain from enunciating a federal rule applicable throughout the nation. The presence of a federal program permits the federal courts to make a choice, but does not of itself determine what the choice will be.

United States v. Carson, 372 F.2d 429, 432 (6th Cir. 1967). In determining whether to apply federal or state law in such cases, the court must balance the need for a federal rule to effectuate a congressional program against principles of federalism favoring minimum interference in matters of state policy. See generally Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957). This discretion in choosing rules of decision allows the application of state law to interstitial questions in federal antitrust litigation. See *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 888-93 (3d Cir. 1975). See generally Note, *The Role of State Law in Federal Antitrust Treble Damage Actions*, 75 HARV. L. REV. 1395 (1962). For this reason, neither the *Sabre Shipping* court nor the *El Camino Glass* court was bound to apply federal common law.

³² 342 U.S. 282 (1952). The *Sabre Shipping* court also cited *Union Stock Yards Co. v. Chicago, B. & Q. R.R.*, 196 U.S. 217 (1905). Although in dictum it mentioned the no-contribution rule (*id.* at 224), *Union Stock Yards* involved not a contribution but an indemnity claim. *Id.* at 223. Since contribution and indemnity are distinct concepts (see W. PROSSER, *supra* note 1, § 51, at 310-11), *Union Stock Yards* does not directly apply to contribution cases such as *Sabre Shipping*. See *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219, 222-23 (D.C. Cir. 1942). Moreover, *Union Stock Yards* arose before *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and involved federal general common law. If the same case were to arise today, based on diversity jurisdiction, *Erie* would require federal courts to apply state contribution law. Federal common law only applies to cases like *Sabre Shipping* that are based on federal questions, for instance, the antitrust statutes. Courts deciding antitrust cases, therefore, should not blindly adhere to pre-*Erie* federal common law. Rather, they should exercise independent judgment by considering the policies underlying the statutes creating jurisdiction and frame rules of contribution consistent with those policies.

tortfeasors at federal common law. That case, however, is not in point. *Halcyon* had hired Haenn to repair *Halcyon's* ship. An employee of Haenn suffered injuries while making the repairs, and sued *Halcyon* for negligence. *Halcyon* in turn impleaded Haenn for contribution. The Court denied *Halcyon's* contribution claim,³³ but not because of the common-law rule against contribution among joint tortfeasors, or any other common-law precept; the Court was exercising not a common-law but an admiralty jurisdiction.³⁴ At issue in *Halcyon* was the scope of the special maritime "moiety rule"³⁵—a doctrine of damage apportionment "distinct from the right of contribution at law, not dependent on subrogation or any other equitable doctrine, and arising from the wrong itself."³⁶ The moiety rule provided that "[w]here two vessels collide due to the fault of both, . . . the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties."³⁷ The Court rejected *Halcyon's* argument that the rule should be extended to noncollision cases, and should be modified to allow an apportionment of damages based upon the wrongdoers' degree of fault.³⁸ The Court relied primarily on Congress's refusal to enact such a rule, despite its extensive legislation in the area.³⁹ The Court also sought to justify its decision, however, by venturing beyond its admiralty jurisdiction and referring to common-law principles:

In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. This judicial attitude has provoked protest on

³³ 342 U.S. at 286-87.

³⁴ "A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise." *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545-46 (1828) (Marshall, C.J.).

³⁵ See generally Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CALIF. L. REV. 304 (1957).

³⁶ *Id.* at 344.

³⁷ *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. at 284.

³⁸ *Id.* at 286-87. The Supreme Court recently altered the method of allocation in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975):

[W]hen two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and . . . liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.

³⁹ See 342 U.S. at 285-86.

the ground that it is inequitable to compel one tortfeasor to bear the entire burden of a loss which has been caused in part by the negligence of someone else. Others have defended the policy of common-law courts in refusing to fashion rules of contribution. To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.⁴⁰

The courts in *Sabre Shipping* and *El Camino Glass* found in this passage a broad holding that joint tortfeasors may not maintain actions for contribution at federal common law.⁴¹ Since common-law contribution was not an issue in *Halcyon*, however, the passage at best constitutes dictum, evidencing the Court's ambivalent attitude toward contribution generally, which might have influenced its decision not to extend the special maritime rule of contribution.⁴²

The Court's subsequent decision in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*⁴³ casts further doubt on *Halcyon*'s worth as a precedent prohibiting common-law contribution. As in *Halcyon*, the Court faced the issue of contribution among joint tortfeasors in a noncollision maritime context. A stevedore sued Kopke for injuries sustained while loading Kopke's ship. Kopke impleaded Cooper for contribution, claiming that Cooper's negligent loading of the ship at an earlier point on its route had created the dangerous condition that led to the plaintiff's injury. Responding to Cooper's argument that *Halcyon* precluded contribution on these facts, the Court purported to clarify its earlier holding:

[W]e think *Halcyon* stands for a more limited rule than the absolute bar against contribution in noncollision cases urged upon us by petitioner.

. . . Since the [plaintiff in *Halcyon*] was covered by the Longshoremen's and Harbor Workers' Compensation Act . . . , he was prohibited from suing his employer Haenn. . . .

⁴⁰ *Id.* at 285 (footnotes omitted). For a more recent expression of misgivings about permitting contribution among joint tortfeasors, see *Howard v. Spafford*, 132 Vt. 434, 435-36, 321 A.2d 74, 75 (1974).

⁴¹ See *El Camino Glass v. Sunglo Glass Co.*, [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,111; *Sabre Shipping Corp. v. American Pres. Lines, Ltd.*, 298 F. Supp. at 1344.

⁴² "As was inevitable when the 'maritime law' was placed in the hands of judges trained in the Anglo-American common law tradition, maritime law amongst us has been heavily influenced, substantively and methodologically, by shoreside law." G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 46 (1974).

⁴³ 417 U.S. 106 (1974).

... Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrained from allowing contribution *in the circumstances of that case*.⁴⁴

The Court thus construed *Halcyon's* denial of contribution as nothing more than an effort to preserve a federal workmen's compensation scheme.⁴⁵ The plaintiff in *Cooper Stevedoring*, however, was an employee of neither Kopke nor Cooper; since he could have sued both and made Cooper "bear its fair share of the damages caused by its negligence," the Court saw "no reason why [Kopke] should not be accorded the same right."⁴⁶ The Court noted that "the principle of division of damages in admiralty has, over the years, been liberally extended by this Court in directions deemed just and proper";⁴⁷ in the absence of countervailing statutory policies, it felt free to continue this trend. Most important, the Court's language belies *Halcyon's* suggestion that contribution among joint tortfeasors is a concept of uncertain merit, not warranting judicial extension: "[A] 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame."⁴⁸

A comparison of two recent non-admiralty cases, *DiBenedetto v. United States*⁴⁹ and *Cohen v. United States*,⁵⁰ illustrates *Cooper Stevedoring's* impact on the federal law of contribution. The issue in each case was whether to permit contribution among persons who are jointly and severally liable for certain tax evasion penalties under the Internal Revenue Code.⁵¹ *DiBenedetto*, like *Sabre Shipping* and *El*

⁴⁴ *Id.* at 111-12 (emphasis added) (footnote omitted).

⁴⁵ See *id.* at 112-13. Courts frequently prohibit third-party contribution actions in order to protect the integrity of workmen's compensation programs. See 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 76.21 (1976).

⁴⁶ 417 U.S. at 113.

⁴⁷ *Id.* at 110.

⁴⁸ *Id.* at 111 (quoting *The Max Morris*, 137 U.S. 1, 14 (1890)).

⁴⁹ 35 A.F.T.R.2d ¶ 75-692 (D.R.I. 1974).

⁵⁰ 35 A.F.T.R.2d ¶ 75-670 (E.D. Mich. 1975).

⁵¹ I.R.C. § 6672 provides in part:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any

Camino Glass, relied on *Halcyon* for the proposition that "in the absence of specific statutory authority, there exists no federal common-law right of contribution."⁵² Thus, the *DiBenedetto* court left the matter of contribution under the applicable section of the Internal Revenue Code to congressional discretion.⁵³

Cohen approached the contribution issue from a different perspective:

The *Di Benedetto* court relied on [*Halcyon*] for the proposition that there can be no federal right of contribution "in the absence of specific statutory authority for it." . . . *Cohen's* attack on *Di Benedetto* is based on a subsequent Supreme Court case clarifying *Halcyon*. That case is *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.* . . .

. . . *Cooper Stevedoring* can be read as permitting federal courts to apply the general rules of contribution unless there are policy considerations mitigating against such application.⁵⁴

Relying on this interpretation of *Cooper Stevedoring*, the *Cohen* court analyzed the nature of the tax penalty involved, and took note of the requirement of "willfulness" as a prerequisite to liability.⁵⁵ Because the conduct of a liable defendant was necessarily "willful," the court reasoned, the defendant could not seek contribution from a companion wrongdoer.⁵⁶ This concentration on the defendant's state of mind seems to depart from the rule of contribution enunciated in *Halcyon* and followed in *Sabre Shipping*, *El Camino Glass*, and *DiBenedetto*. In *Halcyon* and *El Camino Glass*, it made no difference that the defendants had inflicted harm unintentionally.

such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. . . .

The statute "imposes joint and several liability upon responsible persons." Hertz, *Personal Liabilities of the Unsuspecting Executive for Penalties Under Section 6672 and Other Nightmares*, in 32 N.Y.U. INSTITUTE ON FEDERAL TAXATION 1171, 1185 (1974) (emphasis in original), quoted in *DiBenedetto v. United States*, 35 A.F.T.R.2d ¶ 75-692, at 75-1504.

⁵² 35 A.F.T.R.2d ¶ 75-692, at 75-1504.

⁵³ "Any argument that a right of contribution should exist among 'responsible persons' under this section of the Internal Revenue Code should be left to the sound discretion of the Congress, and not to this Court." *Id.* at 75-1505.

⁵⁴ 35 A.F.T.R.2d ¶ 75-670, at 75-1446.

⁵⁵ *Id.* at 75-1446, 75-1447.

⁵⁶ "[E]ven if we conclude that contribution is not inconsistent with sound policy, the applicable rules of contribution would still bar *Cohen's* claim against *Meyer*. This is because, under the general principles of contribution, there is no right to contribution on behalf of willful wrongdoers." *Id.* at 75-1446.

The common-law rule, as those courts perceived it, did not distinguish between intentional and unintentional tortfeasors.⁵⁷ The distinction, however, acquires significance in those jurisdictions that have relaxed the common-law rule as among unintentional tortfeasors.⁵⁸ *Cohen's* application of a state-of-mind criterion accords with the modern trend.

Cooper Stevedoring and *Cohen* suggest a relaxation of the federal law of contribution with respect to unintentional tortfeasors. At the very least, it is clear that *Halcyon*, as clarified by *Cooper Stevedoring*, does not stand for a general rule denying contribution among all joint tortfeasors at either maritime or federal common law. By relying on *Halcyon*, both *Sabre Shipping* and *El Camino Glass* misconstrued the scope of the common-law rule.⁵⁹

B. *Applicability of Contribution Restrictions to Antitrust Defendants*

Both *Sabre Shipping* and *El Camino Glass* dismissed contribution claims on the ground that federal common law precluded contribution among joint tortfeasors. Neither case, however, attempted to substantiate the fundamental assumption that private antitrust actions sound in tort. As its name suggests, the rule against contribution among joint tortfeasors has no application to joint obligors whose liability is nontortious.⁶⁰ Even those jurisdictions that con-

⁵⁷ See *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. at 285-87; text accompanying notes 25-30 *supra*.

⁵⁸ See, e.g., UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1 (a), (c) (adopted by 18 states). See generally note 1 *supra*.

⁵⁹ The court in *El Camino Glass* acknowledged *Cooper Stevedoring*, but distinguished it on the ground that the Supreme Court had "emphasized the well-established maritime rule allowing contribution among joint tort-feasors." [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,111-12. This treatment is incomplete. *Cooper Stevedoring* was a noncollision case in which the Court took a "modern," approving view of contribution, implicitly discrediting the *Halcyon* dictum upon which *El Camino Glass* relied. See text accompanying notes 43-48 *supra*.

⁶⁰ "[C]ontribution 'is not restricted to any special relation, but applies to any relation, except that of joint tort-feasor, where equity between the parties is equality of burden, and one discharges more than his share of the common obligation.'" *Baldrige v. Flothow*, 123 Neb. 218, 222, 242 N.W. 414, 416 (1932) (quoting 13 C.J. *Contribution* § 12 (1917)) (emphasis added). Accord, *Bohlen*, *supra* note 1, at 553-55 (except with respect to joint tortfeasors, right of contribution is "universal"); 18 C.J.S. *Contribution* § 8 (1939). Some sources express the rule as denying contribution among "tortfeasors or wrongdoers" (see, e.g., 18 AM. JUR. 2D *Contribution* §§ 33, 35 (1965)), thus causing confusion as to whether the latter word is used—as is common practice—as a synonym for "tortfeasors," or whether it includes nontortious conduct as well. The weight of authority, however, seems to be that "wrongdoer," in the contribution context, is coterminous with "tortfeasor":

In *Merryweather v. Nixan* [101 Eng. Rep. 1337 (K.B. 1799)], the first and leading case which denied contribution between tortfeasors one of whom had paid the damages for which at the election of the injured person both were liable, . . .

tinue to adhere to the common-law rule allow contribution among joint obligors whose liability arises, for example, by way of contractual undertaking.⁶¹ In denying contribution on the basis of the common-law rule, both *Sabre Shipping* and *El Camino Glass* apparently assumed that antitrust violators are necessarily tortfeasors. Although courts have often characterized antitrust violators as "tortfeasors,"⁶² such generalization is inappropriate. Whether a private antitrust suit sounds in tort ought to depend on the particular nature of the violation.

The antitrust laws embrace certain common-law "competitive torts."⁶³ Most private antitrust liability, however, has no direct common-law analogue. Prior to the Sherman Act, contracts that

counsel for the defendant advanced the proposition that there could not be contribution between "joint wrongdoers". . . .

However, *Merryweather v. Nixan* has been treated as authority for denying contribution where the claimant is a "wrongdoer" *only in the sense that the circumstances are such as to subject him to liability in a tort action*

Bohlen, *supra* note 1, at 555 (emphasis added) (footnote omitted). A more recent analysis suggests that the word "wrongdoer," when used in the contribution context, is even more circumscribed, referring only to *intentional* tortfeasors. See *Dawson v. Contractors Transp. Corp.*, 467 F.2d 727, 738 (D.C. Cir. 1972) (dissenting opinion, Fahy, J.).

Although most federal courts routinely equate "tortfeasor" and "wrongdoer" when discussing contribution (see, e.g., *Brightheart v. McKay*, 420 F.2d 242, 243 (D.C. Cir. 1969); *Stafford Metal Works, Inc. v. Cook Paint and Varnish Co.*, 418 F. Supp. 56, 58 (N.D. Tex. 1976)), one court has stated that the rule denying contribution among joint tortfeasors applies "not merely to tortfeasors but to all 'wrongdoers,'" thus implying that "wrongdoers" has a *wider* field of reference. *Cohen v. United States*, 35 A.F.T.R.2d ¶ 75-670, at 75-1447 (E.D. Mich. 1975). The authorities the court cited, however, seem to treat "wrongdoers" in this context either as synonymous with "tortfeasors," or as referring more specifically to intentional tortfeasors. See *Washington Gas Light Co. v. District of Columbia*, 161 U.S. 316, 327-28 (1896); *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219, 220-22 (D.C. Cir. 1942); *Moyses v. Spartan Asphalt Paving Co.*, 383 Mich. 314, 331, 334, 174 N.W.2d 797, 804, 806 (1970); 18 AM. JUR. 2D *Contribution* § 35 (1965). See also Bohlen, *supra* note 1, at 552 n.1. *But cf.* *DiBenedetto v. United States*, 35 A.F.T.R.2d ¶ 75-692 (D.R.I. 1974) (no common-law right of contribution among intentional tax law violators).

⁶¹ See, e.g., *Karnatz v. Murphy Pac. Corp.*, 8 Wash. App. 76, 81-82, 503 P.2d 1145, 1149 (1972). "It is . . . somewhat ironic to note that at common law contribution is denied among all tortfeasors and is allowed as a matter of course to one who has deliberately chosen to violate a contractual obligation undertaken with others." Commissioners' Prefatory Note (1939 Act), UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT.

⁶² See, e.g., *Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 392 n.4 (5th Cir. 1976); *United States Dental Inst. v. American Ass'n of Orthodontists*, 396 F. Supp. 565, 571 (N.D. Ill. 1975); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 11 (N.D. Ga. 1973); *Ayers v. Pastime Amusement Co.*, 259 F. Supp. 358, 359 (D.S.C. 1966). *Cf.* *Bravman v. Bassett Furn. Indus., Inc.*, 552 F.2d 90, 97 (3d Cir. 1977) (earlier cases held "that there is not a sufficient difference in kind between an antitrust tort and any other tort that § 4 should be interpreted as affording a cause of action which would not otherwise exist").

⁶³ See *Developments in the Law—Competitive Torts*, 77 HARV. L. REV. 888, 925-32 (1964).

unreasonably restrained trade⁶⁴ were illegal only in the sense that they were unenforceable; they gave no affirmative rights to third parties.⁶⁵ This defensive approach of the common law to much of what is now actionable in private antitrust suits provides no basis for characterizing particular violations. The Clayton Act itself, by stating obliquely that a private claimant may have recourse for injuries "in his business or property,"⁶⁶ provides little guidance in this regard. The nature of the private antitrust liability, therefore, has been a matter of judicial construction.

*Williamson v. Columbia Gas & Electric Corp.*⁶⁷ presents the only carefully reasoned analysis of the essential character of private antitrust liability.⁶⁸ The plaintiff, a trustee-in-bankruptcy for the Inland Gas Corporation, alleged that the defendant, a former competitor of Inland, had violated section 7 of the Clayton Act⁶⁹ by purchasing a controlling block of Inland stock. The plaintiff claimed that the defendant used this unlawfully obtained control to force Inland to abandon a pipeline project essential to Inland's continued survival. The defendant allegedly appropriated the project to itself, thereby pushing Inland into bankruptcy.

The issue before the court was whether the statute of limitations for debt upon a specialty or for trespass on the case (tort)

⁶⁴ These included contracts "for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrued to them from free competition in the market." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497 (1940). See Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 784-86 (1955).

⁶⁵ See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497 (1940); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898) (dictum), *modified on other grounds*, 175 U.S. 211 (1899); *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 233-34, 55 N.W. 1119, 1121 (1893); *Mogul S.S. Co. v. McGregor, Gow & Co.*, [1892] A.C. 25, 51 (1891). An important exception to this treatment of contracts in unreasonable restraint of trade arose in cases of "[a] conspiracy to create a monopoly in commodities which constitute the necessities of life, or to enhance the market price thereof"; a conspiracy of this type was a criminal offense. *State v. Duluth Bd. of Trade*, 107 Minn. 506, 530, 121 N.W. 395, 404-05 (1909).

⁶⁶ 15 U.S.C. § 15 (1970).

⁶⁷ 110 F.2d 15 (3d Cir. 1939), *cert. denied*, 310 U.S. 639 (1940).

⁶⁸ Courts display remarkable casualness in characterizing antitrust violations as torts. See cases cited in note 62 *supra*.

⁶⁹ Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (1970)). At the time *Williamson* was decided, the section provided in pertinent part:

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

governed the plaintiff's action. In affirming that the tort statute of limitations applied to bar the claim, the Third Circuit adopted a thoughtful approach. The court first acknowledged that the antitrust statutes had created a private right of action "which up to that time had received no judicial recognition."⁷⁰ The court therefore sought to ascertain the common-law form of action that most closely resembled the plaintiff's statutory claim. The court concluded that "the cause of action given by Section 7 of the Clayton Act fits into that broad field of tort law which protects a man's business from wrongful interference. . . . The statute simply makes an addition to this group of recognized torts."⁷¹

Within its factual context, the *Williamson* court's conclusion is sound. The defendant was alleged to have interfered with Inland's business by abusing illegally obtained control. Such conduct closely resembles the common-law tort of wrongful interference with a trade or calling.⁷² Similarly, the predatory pricing tactics allegedly practiced by the *Sabre Shipping* defendants in their attempt to destroy Sabre's business constituted an interference within the general scope of the wrongful-interference tort doctrine. Indeed, quite apart from the antitrust laws, courts exercising a common-law jurisdiction have deemed predatory pricing to be tortious on a wrongful-interference theory.⁷³

Not all antitrust violations, however, necessarily amount to wrongful interference. *El Camino Glass* involved no claim that the defendants attempted to destroy or otherwise interfere with the plaintiffs' businesses. Rather, the plaintiffs claimed that the defendants received excessive consideration from them through price-fixing. *Williamson's* holding, therefore, does not fit the facts of *El Camino Glass*. Nevertheless, *Williamson* supplies a workable mode of inquiry for characterizing private antitrust liability of all sorts: What common-law form of action most closely resembles the plaintiff's statutory action? Antitrust violations that do not interfere with

⁷⁰ 110 F.2d at 17. See notes 64-65 and accompanying text *supra*.

⁷¹ 110 F.2d at 18.

⁷² See RESTATEMENT OF TORTS §§ 708-816 (1938), cited in *Williamson v. Columbia Gas & Elec. Co.*, 110 F.2d at 18. An 1898 Illinois case presents a clear statement of what constitutes the tort of wrongful interference: "No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require." *Doremus v. Hennessy*, 176 Ill. 608, 614, 52 N.E. 924, 925 (1898).

⁷³ See, e.g., *Boggs v. Duncan-Schell Furn. Co.*, 163 Iowa 106, 115-17, 143 N.W. 482, 486 (1913); *Memphis Steam Laundry-Cleaners, Inc. v. Lindsey*, 192 Miss. 224, 238-39, 5 So. 2d 227, 232 (1941). See generally 30 AM. JUR. INTERFERENCE § 40 (1940).

a plaintiff's business, but merely result in the defendant's unjust enrichment at the plaintiff's expense, more closely resemble quasi-contract than tort.⁷⁴ This conclusion draws support from two quarters: the common-law treatment of usury, and the common-law treatment of overcharges exacted by public utilities and common carriers.

The allegedly excessive commodity charges of *El Camino Glass* resemble usurious interest charges. Each case involves breach of a statutory prohibition giving rise to unjust enrichment. Unlike the cause of action in *El Camino Glass*, however, the private rights of action bestowed by modern usury statutes have common-law counterparts.⁷⁵ At common law, a suit for recovery of usurious interest payments lay in a common count for money had and received—not in tort.⁷⁶

The misconduct alleged in *El Camino Glass* also resembles the exaction of overcharges by a public utility or common carrier.⁷⁷

⁷⁴ Exacting excess profits through the unlawful exercise of market power results in "the receipt of a benefit the retention of which is unjust, and requiring the obligor to make restitution." F. WOODWARD, *THE LAW OF QUASI CONTRACTS* § 3, at 4 (1913). Such transfers can be conceptualized in two ways. One way is to view the defendants' misconduct as a kind of economic duress. This analysis has been applied to abuses of economic power by common carriers. *See id.* §§ 220, 221; Dalzell, *Duress by Economic Pressure I*, 20 N.C.L. REV. 237, 243-46 (1942). *See also* notes 77-81 and accompanying text *infra*. A second way to conceptualize such transfers is to view the overcharges simply as mala prohibita, as in cases of usurious lending. *See* notes 75-76 and accompanying text *infra*. *Cf.* F. WOODWARD, *supra* §§ 222, 223 (courts apply both doctrines in allowing recovery of usurious interest). The cause of action in either case sounds in quasi-contract.

The statutory trebling of damages, to the extent punitive, detracts from the conclusion that private antitrust suits may be quasi-contractual, since punitive damages are generally unavailable in contract actions. *See* 5 S. WILLISTON, *LAW OF CONTRACTS* § 1340 (3d ed. 1968). However, some states provide doubling or trebling of damages in usury actions, which are essentially quasi-contractual. *See, e.g.,* CAL. CIV. CODE § 1916-3 (West 1954 & Supp. 1977); ILL. REV. STAT. ch. 74, § 6 (1975). Furthermore, considerable evidence suggests that the treble-damage remedy was largely aimed not at punishment, but at encouraging private enforcement of the antitrust laws. *See* K. ELZINGA & W. BREIT, *THE ANTI-TRUST PENALTIES* 63-67 (1976). Multiple damages imposed for such a pragmatic purpose are not inconsistent with the view that § 4 claims may be quasi-contractual in nature.

⁷⁵ *See generally* F. WOODWARD, *supra* note 74, §§ 222, 223.

⁷⁶ *See* *Stock v. Meek*, 35 Cal. 2d 809, 817, 221 P.2d 15, 20 (1950); *Stone v. James*, 142 Cal. App. 2d 738, 740, 299 P.2d 305, 307 (1956); *Baum v. Thoms.*, 150 Ind. 378, 382, 50 N.E. 357, 358-60 (1898); *Plitt v. Kaufman*, 188 Md. 606, 612, 53 A.2d 673, 676 (1947); *Neuscheler v. See*, 131 N.J.L. 368, 371, 36 A.2d 753, 754-55 (1944); *State Bank v. Lanam*, 34 Okla. 485, 487, 126 P. 220, 221 (1912); *Edwards v. Surety Finance Co.*, 176 Wash. 534, 537, 30 P.2d 225, 226-27 (1934); *Wood v. Lake*, 13 Wis. 84, 96 (1860).

⁷⁷ The Supreme Court's decision in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), illustrates this parallel. The Court considered whether proof that a private antitrust plaintiff had "passed-on" illegal overcharges would defeat the plaintiff's suit to recover them. The Court rejected *United Shoe's* pass-on defense, relying in part on its earlier decision in *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531

Both instances involve receipts of supra-competitive prices through the exercise of functionally identical economic power.⁷⁸ In contrast with its posture toward most restraints of trade,⁷⁹ the common law refused to tolerate abuses of economic power by public service entities; it provided affirmative rights of action to persons forced to pay unreasonable rates.⁸⁰ The weight of authority characterizes this form of action, too, as a common count for money had and received.⁸¹

The *Williamson* approach of analogizing the statutory antitrust action to similar common-law actions therefore leads to the conclusion that the private antitrust claim in *El Camino Glass* sounded not in tort but in quasi-contract. Under this analysis, the *El Camino Glass* court erred in relying on the common-law rule against contribution among joint tortfeasors. Nor should it be surprising that the law of tort does not subsume all private antitrust liability. The great variety of acts that can give rise to such liability would seem to defy uniform characterization. *Sabre Shipping* and *El Camino Glass*, along with the great weight of authority, imply a contrary view, but one that is largely unreasoned.⁸² The potentially crippling losses that can accompany a denial of contribution require a less perfunctory approach to defining the nature of private antitrust liability and hence the scope of the common-law rule.

(1918), a non-antitrust case that rejected a railroad's pass-on defense in a suit for the restitution of excessive freight charges. 392 U.S. at 490 & n.8.

⁷⁸ See C. WILCOX, PUBLIC POLICIES TOWARD BUSINESS 275-76 (4th ed. 1971).

⁷⁹ See notes 64-65 and accompanying text *supra*.

⁸⁰ See Dalzell, *supra* note 74, at 243-46.

⁸¹ See *Mobile & M. Ry. v. Steiner*, McGehee & Co., 61 Ala. 559, 595 (1878); *Cullen v. Seaboard Air Line R.R.*, 63 Fla. 122, 129, 58 So. 182, 184 (1912); *Boston v. Edison Elec. Illum. Co.*, 242 Mass. 305, 310, 136 N.E. 113, 116 (1922); *E.D. Clough & Co. v. Boston & M.R.R.*, 77 N.H. 222, 251, 90 A. 863, 876-77 (1914) (dissenting opinion); *Jeremy Fuel & Grain Co. v. Denver & R.G.R.R.*, 60 Utah 153, 156, 207 P. 155, 156 (1922); Dalzell, *supra* note 74, at 243-46. But see *Graham v. Chicago, M. & St. P. Ry.*, 53 Wis. 473, 482, 10 N.W. 609, 612 (1881).

The Supreme Court has stated in dictum that the exaction of "exorbitant" overcharges by a common carrier is a tort. *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U.S. 654, 660 (1931). In so stating, however, the Court relied entirely on *Smith v. Chicago & N.W. Ry.*, 49 Wis. 443, 5 N.W. 240 (1880), an overcharge case which held nothing of the sort. *Smith* noted that the "foundation" of the plaintiff's action was in the nature of money had and received. Where the defendant had overcharged fraudulently, however, the plaintiff's action also sounded in tort. *Id.* at 448, 5 N.W. at 241-242. The Court in *Lewis* did not cite the subsequent decision of the Wisconsin Supreme Court in *Graham v. Chicago, M. & St. P. Ry.*, 53 Wis. 473, 482, 10 N.W. 609, 612 (1881), which extended *Smith's* tort holding to all rate overcharge cases. Thus, *Lewis's* exclusive reliance on *Smith* suggests that the Court might have used the word "exorbitant" to limit its dictum. In any event, the *Lewis* dictum and the Wisconsin cases are contrary to the majority view.

⁸² See note 68 *supra*.

C. Policy Considerations

In *Cooper Stevedoring*, the Supreme Court suggested that permitting contribution among negligent tortfeasors leads to a "more equal distribution of justice."⁸³ Even before *Cooper Stevedoring*, this kind of reasoning had caused lower federal courts, in contexts other than antitrust, to expressly repudiate the common-law rule,⁸⁴ or to find ways of circumventing it.⁸⁵ Moreover, since 1959 the number of jurisdictions permitting some form of contribution among joint tortfeasors has increased from twenty-seven⁸⁶ to thirty-eight.⁸⁷ Although aware of these trends, the courts in *Sabre Shipping*⁸⁸ and *El Camino Glass*⁸⁹ advanced three policy reasons for denying contribution among antitrust "tortfeasors": (1) congressional intent; (2) protection of plaintiffs' ability to control the scope of their lawsuits and to obtain settlements; and (3) deterrence of

⁸³ 417 U.S. at 111 (quoting *The Max Morris*, 137 U.S. 1, 14 (1890)).

⁸⁴ See, e.g., *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 405 (7th Cir. 1974).

⁸⁵ Even where the securities laws have not expressly provided for contribution courts have permitted it on the general principle that the securities laws are to be administered in pari materia. See *Globus, Inc. v. Law Research Serv., Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971); *deHaas v. Empire Petrol. Co.*, 286 F. Supp. 809, 815-16 (D. Colo. 1968), *modified on other grounds*, 435 F.2d 1223 (10th Cir. 1970). In *Gomes v. Brodhurst*, 394 F.2d 465, 467-69 (3d Cir. 1968), the Third Circuit exhibited similar activism by anticipating that the Virgin Islands would renounce the common-law rule against contribution among joint tortfeasors.

⁸⁶ Comment, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L.J. 964, 969-70 (1959).

⁸⁷ See *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942); *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977); *National Farmers Union Property & Cas. Co. v. Nelson*, 260 Iowa 163, 147 N.W.2d 839 (1967); *Bedell v. Reagan*, 159 Me. 292, 192 A.2d 24 (1963); *Grothe v. Shaffer*, 305 Minn. 17, 232 N.W.2d 227 (1975); *Royal Indem. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975); *Wurtzinger v. Jacobs*, 33 Wis. 2d 703, 148 N.W.2d 86 (1967); ALASKA STAT. § 09.16.010 (1973); ARK. STAT. ANN. § 34-1002 (1962); CAL. CIV. PROC. CODE § 875 (West Supp. 1977); DEL. CODE ANN. § 6302 (1975); FLA. STAT. ANN. § 768.31 (West Supp. 1977); GA. CODE ANN. § 105-2012 (Supp. 1977); HAW. REV. STAT. § 663-12 (1976); IDAHO CODE § 6-803 (Supp. 1977); KY. REV. STAT. ANN. § 412.030 (Baldwin 1977); LA. CIV. CODE ANN. art. 2103 (West Supp. 1977); MD. ANN. CODE art. 50, § 17 (1972); MASS. ANN. LAWS ch. 231B, § 1 (Michie/Law. Co-op 1974); MICH. STAT. ANN. § 27A.2925(1) (Supp. 1977); MISS. CODE ANN. § 85-5-5 (1972); MO. REV. STAT. § 537.060 (1969); NEV. REV. STAT. § 17.225 (1973); N.J. STAT. ANN. § 2A:53A-2 (West 1952); N.M. STAT. ANN. § 24-1-12 (1954); N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976); N.C. GEN. STAT. § 1B-1 (1969 & Supp. 1977); N.D. CENT. CODE § 32-38-01 (1976); OR. REV. STAT. § 18.440 (1977); P.A. STAT. ANN. tit. 12, § 2083 (Purdon 1967); R.I. GEN. LAWS § 10-6-3 (Supp. 1977); S.D. COMPILED LAWS ANN. § 15-8-12 (1969); TENN. CODE ANN. § 23-3102 (Supp. 1977); TEX. STAT. ANN. tit. 42, § 2212 (Vernon 1971); UTAH CODE ANN. § 78-27-39 (1977); VA. CODE § 8.01-34 (1977); W. VA. CODE § 55-7-13 (1966); WYO. STAT. § 1-1-110 (1977).

⁸⁸ 298 F. Supp. at 1345.

⁸⁹ [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,111-12.

antitrust violations. None of these justifications withstands critical analysis.

1. Congressional Intent

The congressional intent argument involves two contentions. The first, advanced in *Sabre Shipping*, is that since the antitrust laws, unlike the securities laws, fail to provide for contribution, Congress must have intended to deny contribution.⁹⁰ This contention is unpersuasive. The Supreme Court has stated that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."⁹¹ This caveat seems particularly applicable to *Sabre Shipping*, in which the court decided a novel issue of law that was unlikely to have attracted congressional attention.⁹² Even if Congress had taken note of the contribution issue, its silence would still be of questionable significance since "[c]ongressional inaction frequently betokens . . . preoccupation, or paralysis."⁹³ *Sabre Shipping's* reliance on a congressional failure to act was therefore misplaced.⁹⁴

⁹⁰ See text accompanying note 15 *supra*.

⁹¹ *Girouard v. United States*, 328 U.S. 61, 69 (1946). *Accord*, *Gooding v. United States*, 416 U.S. 430, 469 (1974) (dissenting opinion, Marshall, J.); *NLRB v. Plasterers' Union*, 404 U.S. 116, 129-30 (1974). See H. HART & M. SACKS, *THE LEGAL PROCESS* 1393-95 (tentative ed. 1958).

⁹² Arguments based on congressional silence are most persuasive where the silence follows a judicial development of the law. Even in these circumstances, however, the Supreme Court has generally been unwilling to give controlling weight to congressional inaction. "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Compare *Boys Markets, Inc. v. Clerks Union, Local 770*, 398 U.S. 235, 240-42 (1970) (dictum) (Congress's failure to respond to *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), did not bar Court from overruling that decision, although it involved controversial issue of statutory construction), with *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972) (50 years of congressional silence, coupled with repeated defeat of proposed remedial legislation, signified congressional intent to preserve major-league baseball's judicially created antitrust exemption). It follows that the *Sabre Shipping* court stood on especially weak ground in relying on congressional silence when the issue was one of first impression.

⁹³ *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969). Other possible reasons for congressional silence abound—e.g., political expedience, legislative indifference, and a belief that other proposals have a stronger claim on the legislature's limited time and resources. See H. HART & M. SACKS, *supra* note 91, at 1395-96.

⁹⁴ Nor can Congress's failure to respond to *Sabre Shipping* be viewed as a reliable indication of legislative intent. See note 92 *supra*. The Supreme Court swept aside "tacit ratification" arguments in both *Boys Markets, Inc. v. Clerks Union, Local 770*, 398 U.S. 235, 240-42 (1970), and *Girouard v. United States*, 328 U.S. 61, 69-70 (1946), where Congress had remained silent in the face of Supreme Court precedents of several years' standing. The reasoning of those cases applies a fortiori to a district court precedent on a rarely litigated issue.

The second contention is more limited. The court in *El Camino Glass* reasoned that because the antitrust laws are strict liability statutes, a defendant's lack of intent to violate them should not affect his entitlement to contribution.⁹⁵ This argument confuses the issues of liability and apportionment. Although the imposition of strict liability may reflect a congressional purpose to facilitate private enforcement of the antitrust laws, that purpose would not be compromised by allowing a defendant's lack of intent to figure in a separate contribution action following judgment in the original suit.⁹⁶ Strict liability as between plaintiff and defendant does not mandate strict liability as between the defendants themselves.

2. *Protection of Plaintiffs' Control Over Litigation*

The second policy reason advanced for applying the common-law rule is that permitting contribution might interfere with plaintiffs' prosecution of their original actions. This argument also has two facets. First, the *Sabre Shipping* court feared that the availability of contribution would inhibit settlements.⁹⁷ The *El Camino Glass* court, however, recognized that courts could fashion contribution rules that avoid such inhibition by protecting the rights of settling defendants.⁹⁸

Second, the courts in both *Sabre Shipping* and *El Camino Glass* contended that permitting contribution would destroy plaintiffs'

⁹⁵ [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,112. The court's statement that the antitrust laws are strict liability statutes was an oversimplification. Under § 2 of the Sherman Act (15 U.S.C. § 2 (1970)), combinations, conspiracies, and attempts to monopolize all require a showing of specific intent. See 16A J. VON KALINOWSKI, BUSINESS ORGANIZATIONS §§ 9.01(4), 9.02(5) (1969). See also *United States v. United States Gypsum Co.*, 98 S. Ct. 2864, 2872-78 (1978).

⁹⁶ Admittedly, prejudice to the original plaintiff might result if defendants seek contribution by way of cross-claims or third-party complaints. FED. R. CIV. P. 42(b) avoids this problem, however, by authorizing the separate trial of these claims. See notes 100-05 and accompanying text *infra*. Nevertheless, the court in *El Camino Glass* stated that "[s]everance of the third party complaint is an uncertain and inadequate remedy." [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,112.

⁹⁷ See text accompanying note 16 *supra*.

⁹⁸ [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,112 (citing *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968)). See, e.g., *Martello v. Hawley*, 300 F.2d 721 (D.C. Cir. 1962). Similarly, the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, which has been adopted in 18 states, provides in § 4:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant,

ability to control the size and scope of their lawsuits.⁹⁹ Although this argument is essentially sound, it suffers to the extent that Federal Rule of Civil Procedure 42(b) empowers trial judges to restore such suits to their original proportions.¹⁰⁰ Under Rule 42(b), where a plaintiff is inconvenienced or prejudiced by a defendant's expansion of his suit, the court, in its discretion, may order separate trials. The *El Camino Glass* court dismissed this argument by saying that "[s]everance of the third party complaint is an uncertain and inadequate remedy."¹⁰¹ Despite the uncertainty inherent in any discretionary remedy, the broad language of Rule 42(b) at least poses no significant restrictions on a judge's power to grant separate trials.

Moreover, misgivings about the *adequacy* of the remedy seem ungrounded. Having ordered separate trials, the judge may limit discovery to the segregated issues.¹⁰² Separation will confine the trial of the original action to those issues that are relevant to the plaintiff's claim; separated claims and parties will neither confuse nor complicate the trial.¹⁰³ Finally, under Rule 54(b),¹⁰⁴ the origi-

or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

⁹⁹ See text accompanying notes 16 & 28 *supra*.

¹⁰⁰ FED. R. CIV. P. 42(b) provides: "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim . . ."

¹⁰¹ [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,112. The court did not expressly refer to Rule 42(b). Since the court was briefed as to Rule 42(b) (separate trials), but not as to Rule 21 (misjoinder and nonjoinder of parties) (see Memorandum of United Glass Company In Opposition to Motion to Dismiss Third Party Complaint at 23, *El Camino Glass v. Sunglo Glass Co.*, [1977-1] TRADE CAS. (CCH) ¶ 61,533 (N.D. Cal. 1976)), the court's use of the word "severance" was probably an erroneous shorthand reference to separate trials under Rule 42(h). Confusion of Rules 21 and 42(b) is common. See C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2387 (1971).

¹⁰² See *Ellingson Timber Co. v. Great Northern Ry.*, 424 F.2d 497, 499 (9th Cir.), *cert. denied*, 400 U.S. 957 (1970); Pegram, *Separate Trials in Patent-Antitrust and Patent-Unenforceability Litigation*, 64 F.R.D. 185, 196 (1975).

¹⁰³ "Other questions which might be brought in by the presence of the third party need not breed confusion, since the trial judge, under the provisions of rule 42, has it completely within his power to determine what issues shall be tried together and what separately." *Ford Motor Co. v. Milby*, 210 F.2d 137, 139 (4th Cir. 1954).

¹⁰⁴ FED. R. CIV. P. 54(b) provides in part:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

nal plaintiff can obtain final judgment on his claim even if cross-claims or third-party actions for contribution are still pending.¹⁰⁵ The Federal Rules thus provide adequate protection of the plaintiff's ability to control the size and scope of his lawsuit.

3. Deterrence

As a final justification for applying the common-law rule, *El Camino Glass* suggests that denying contribution might enhance the deterrent effect of private antitrust suits.¹⁰⁶ Although the court made no attempt to develop this idea, prevailing economic theory lends it credibility. Economists have argued that business managers, particularly in larger organizations, are generally "risk averse"—that is, they are deterred more by the slight prospect of a large loss than by the strong prospect of a small loss.¹⁰⁷ If this hypothesis is correct, application of the rule denying contribution should inhibit those managers who are aware of the rule from participating in unlawful group activity: Although the rule decreases the likelihood that an individual participant will be held liable, it increases the size of the potential liability.

Unfortunately, this inhibitory effect depends on managers' awareness of the common-law rule. Unlike fines or penalties, which most laymen readily understand, the concept of joint and several liability, and the consequences of a rule denying contribution, are probably not fully appreciated by many nonlawyers. Moreover, potential fines and penalties can be calculated with reasonable precision. A participant in an anticompetitive conspiracy, however, even if he understands the law, may be unaware of the extent of the conspiracy,¹⁰⁸ and fail to appreciate the magnitude of his potential liability. Thus, participants' ignorance of either the relevant legal concepts or the extent of the wrongdoing with which they are involved may limit the deterrent effect of the common-law rule. Finally, denying contribution can consistently deter only willful lawbreakers; it will not inhibit many violations committed uninten-

¹⁰⁵ See, e.g., *United Bank v. Hartford Accident & Indem. Co.*, 529 F.2d 490, 492-93 (10th Cir. 1976). See generally 6 MOORE'S FEDERAL PRACTICE ¶¶ 54.23[2], 54.36 (2d ed. 1976).

¹⁰⁶ "[T]he court believes that the deterrent effect of the antitrust laws may be increased by not permitting defendants to redistribute the cost of an antitrust violation." [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,112.

¹⁰⁷ See, e.g., K. ELZINGA & W. BREIT, *supra* note 74, at 120-29.

¹⁰⁸ Cf., e.g., *Blumenthal v. United States*, 332 U.S. 539, 556-59 (1947)(salesmen of illegally priced whiskey unaware of conspiracy's exact limits).

tionally or in response to economic coercion.¹⁰⁹ Thus, the deterrence rationale provides at best a weak justification for blanket denial of contribution.

III

AN ALTERNATIVE APPROACH TO CONTRIBUTION AMONG PRIVATE ANTITRUST DEFENDANTS

The discussion in the preceding section highlighted a number of practical and conceptual shortcomings in the present denial of contribution among private antitrust defendants. Briefly summarized, the main problems lie in (1) adherence to the mistaken view that contribution remains generally unavailable among joint tortfeasors at federal common law; (2) the assumption that all antitrust violators are tortfeasors, regardless of the particular nature of their acts or the laws violated; and (3) reliance on weak policy arguments for denying contribution among all private antitrust defendants. These difficulties, combined with the common-law rule's obvious inequities and open invitation to collusion,¹¹⁰ support the scholarly commentators' nearly unanimous condemnation of the rule.¹¹¹

All antitrust violators are not equal. They range from the predatory price-cutter who ruthlessly eliminates competitors to the helpless franchisee of a giant corporation, whose livelihood is threatened if he fails to cooperate in his franchisor's anticompetitive scheme. The view that all are "tortfeasors" and therefore barred from seeking contribution is not only legally defective,¹¹² but also fundamentally unfair.

A better approach would involve analyzing private antitrust liability according to two variables: whether the liability is tortious, and whether the party seeking contribution acted intentionally or unintentionally. This analysis yields four possible combinations: (1) intentional tortious harm (e.g., *Sabre Shipping*); (2) intentional nontortious harm; (3) unintentional tortious harm; and (4) unintentional nontortious harm (e.g., *El Camino Glass*). The common-law

¹⁰⁹ For an example of such coercion, see *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139-41 (1968).

¹¹⁰ For an example of such collusion, see *Pennsylvania Co. v. West Penn Rys.*, 110 Ohio St. 516, 144 N.E. 51 (1924).

¹¹¹ See, e.g., W. PROSSER, *supra* note 1, § 50; Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932).

¹¹² See notes 60-82 and accompanying text *supra*.

rule should operate automatically to deny contribution only in category (1). This category would include concerted refusals to deal, predatory conspiracies, and other violations committed with the intent to injure or destroy competitors. Antitrust violations involving malice and intent to injure fall within the scope of the common-law rule and thus provide appropriate targets for a per se approach. Conversely, the common-law rule should be wholly inapplicable to violations within category (4). Here, the rule is inapposite because the violation is not a tort.¹¹³ Moreover, harm caused by nontortious acts, such as the diminution of wealth caused by "an extravagant bill,"¹¹⁴ seems less invidious than harm caused by tortious acts, especially when inflicted unintentionally. Here, the additional sanction of denying contribution is least appropriate. Subject to procedural safeguards,¹¹⁵ courts should therefore freely permit contribution in cases of unintentional nontortious harm.

Categories (2) and (3) are more problematic. Although the common-law rule is technically inapplicable to intentional nontortious conduct,¹¹⁶ perhaps the law should penalize all willful violators. Unintentional tortious conduct, on the other hand, technically falls within the scope of the traditional common-law rule.¹¹⁷ Thirty-eight states, however, now permit contribution in cases of unintentional tort,¹¹⁸ and the Supreme Court has evinced a similar attitude.¹¹⁹ Because conflicting considerations beset the issue of contribution in these categories, courts should examine an additional factor—the comparative culpability of the parties. Where the contribution-seeking party is an unintentional tortfeasor (category (3)) and the party from whom contribution is sought is an intentional tortfeasor (category (1)), contribution is probably justified. This conclusion follows not only from the comparative culpability of the parties, but also from the apparent liberalization of the federal rule against contribution with regard to unintentional tortfeasors.¹²⁰ On the other hand, contribution should be denied when the contribution-seeking party is an intentional nontortious

¹¹³ See notes 60-82 and accompanying text *supra*.

¹¹⁴ *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 399 (1906) (Holmes, J.).

¹¹⁵ Under the proposed approach, judges should liberally allow the separate trial of contribution actions to avoid complexity, delay, and confusion in the original action. See FED. R. CIV. P. 42(b); notes 99-105 and accompanying text *supra*.

¹¹⁶ See note 60 *supra*.

¹¹⁷ See W. PROSSER, *supra* note 1, § 50.

¹¹⁸ See note 87 and accompanying text *supra*.

¹¹⁹ See text accompanying notes 43-48 *supra*.

¹²⁰ See notes 43-59 and accompanying text *supra*.

violator (category (2)), and the party from whom contribution is sought is an unintentional nontortious violator (category (4)). The most difficult cases arise when both parties fall within a single category (either (2) or (3)). In such cases, two factors suggest that courts should be more willing to permit contribution among unintentional tortfeasors (category (3)) than among intentional nontortious violators (category (2)). First, the deterrent rationale for denying contribution applies primarily to intentional violators.¹²¹ Second, since the common-law rule is based on a refusal to recognize equities in favor of wrongdoers that spring from their own wrongful acts,¹²² the defendant's state of mind rather than the legal label given to his anticompetitive conduct ("tortious" or "nontortious") would seem to be the better yardstick of culpability.

CONCLUSION

In *Sabre Shipping* and *El Camino Glass*, the only reported cases that have squarely determined whether private antitrust defendants are entitled to contribution, federal district courts adopted a per se approach: antitrust violators are tortfeasors, and federal common law prohibits contribution among joint tortfeasors. Both of these assertions are doubtful. Recent cases suggest that federal common law no longer denies contribution among all joint tortfeasors. Moreover, not all antitrust violators are tortfeasors. The policy arguments marshalled in favor of the per se approach are also questionable. A more accurate and flexible analysis would begin by taking two factors into account: whether the violation giving rise to liability was tortious, and whether it was intentional. If both factors are present, the common-law rule properly applies and contribution should be denied; if both are absent, contribution should be allowed. In cases where only one factor is present, courts must undertake the further task of weighing the relative culpability of the parties to determine whether one should receive contribution from another.

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¹²¹ See notes 106-09 and accompanying text *supra*.

¹²² See note 1 *supra*.

